STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2007
v	No. 267212 Saginaw Circuit Court
WILLIE IVY EDWARDS, Defendant-Appellant.	LC No. 05-025985-FC

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of armed robbery, MCL 750.529, and carrying a dangerous weapon with unlawful intent, MCL 750.226. Defendant was sentenced as a fourth-time habitual offender, MCL 769.12, to concurrent terms of ten-and-a-half to twenty years' imprisonment for the armed robbery conviction and one to ten years' imprisonment for the carrying a dangerous weapon conviction. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

JC Penney loss prevention officers observed defendant take four pairs of khaki pants from a store display, conceal them in a garbage bag, and leave the store with the merchandise without paying for it. The officers followed defendant out of the store and, after identifying themselves as loss prevention personnel, asked defendant to return to the store. Defendant stopped and dropped the bag, then opened up a blue-handled Sheffield folding knife and pointed it at the officers. Defendant directed the officers to "stay back away from me or I'll cut you." Although the knife contained both a knife blade and a razor blade part, one of the officers testified that it was the knife blade that was brandished.

Defendant thereafter left the garbage bag on the ground and ran across the street and into another store, where police officers found him in a bathroom. An unsheathed razor blade was found in defendant's pocket, and a blue-handled knife was found in a wastebasket in the bathroom. At trial, defendant took the stand and admitted that he shoplifted the pants and that he brandished the blue-handled knife at the loss prevention officers in an attempt to escape. It was generally argued by trial counsel, however, that defendant did not use the knife to accomplish the taking and, therefore, he was not guilty of armed robbery.

On appeal, defendant first argues that it was an abuse of discretion for the district judge to bind him over on the charge of carrying a dangerous weapon with unlawful intent in violation of MCL 750.226 because insufficient evidence was presented at the preliminary examination that the knife in question had a blade of more than three inches in length. Defendant failed to preserve this issue by filing a motion to quash. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999); *People v Hoffman*, 205 Mich App 1, 23; 518 NW2d 817 (1994). Therefore, this Court's review is limited to determining whether defendant has demonstrated a plain error that affected his substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A district court's ruling that alleged conduct falls within the scope of a criminal statute is a question of law that is reviewed de novo. *People v Waltonen*, 272 Mich App 678; ___ NW2d ___ (2006); *People v Drake*, 246 Mich App 637, 639; 633 NW2d 469 (2001). The district court's decision to bind a defendant over for trial is reviewed for an abuse of discretion. *People v Fletcher*, 260 Mich App 531, 551-552; 679 NW2d 127 (2004).

Even if the district court erroneously concluded that sufficient evidence was presented at the preliminary examination to bind over defendant for trial, the error is rendered harmless by the presentation at trial of sufficient evidence to convict. *People v Hall*, 435 Mich 599; 460 NW2d 520 (1990); *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). In other words, "[i]f a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004), citing *Hall*, *supra* at 601-603, and *People v Yost*, 468 Mich 122, 124 n 2; 659 NW2d 604 (2003).

MCL 750.226 provides:

> Any person who, with intent to use the same unlawfully against the person of another, goes armed with a pistol or other firearm or dagger, dirk, razor, stiletto, or knife having a blade over 3 inches in length, or any other dangerous or deadly weapon or instrument, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years or by a fine of not more than 2,500 dollars.

The elements of the crime of carrying a dangerous weapon with unlawful intent, then, are (1) carrying a dangerous weapon, (2) with the intent to unlawfully use the weapon against another person. *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992).

Evidence was presented at trial that defendant was carrying a knife containing both a knife blade and a razor blade part. Although one of the loss prevention officers testified that it appeared it was the knife blade that defendant had pointed at him, an unsheathed razor blade was found in defendant's pocket at the time of his arrest. Clearly, a knife containing a knife blade and a razor blade portion is a "dangerous or deadly weapon" within the meaning of MCL 750.226. Moreover, the statute specifically prohibits the carrying of a "razor" with unlawful intent, and the evidence fully supports a finding that defendant was armed with a razor.

Although the information originally charged that defendant violated MCL 750.226 by going "armed with a razor *and/or a knife having a blade over three inches in length*," the prosecutor was properly permitted, prior to trial, to amend the charge to elide the reference to a blade of over three inches in length and to add a reference to the "other dangerous … weapon" portion of the statute. A trial court may permit the prosecutor to amend the information before, during, or even after trial to cure any defect or imperfection, unless it would unfairly surprise or prejudice the defendant. MCR 6.112(H); *People v Jones*, 252 Mich App 1, 4-5; 650 NW2d 717 (2002). Defendant did not contend below, and does not contend now, that he was prejudiced in any way by the amendment of the information. Accordingly, because defendant was fairly convicted at trial of carrying a dangerous weapon with unlawful intent, he is precluded from raising on appeal the issue whether the evidence at the preliminary examination was sufficient to warrant a bindover. *Wilson*, *supra* at 1018; *Hall*, *supra* at 601-603.

Defendant next argues that the trial court erred in denying his motion to instruct the jury on retail fraud as a lesser included offense of armed robbery. This Court reviews de novo a trial court's decision whether to instruct on a necessarily included lesser offense. *People v Brown*, 267 Mich App 141, 145; 703 NW2d 230 (2005). Instructions on necessarily included lesser offenses are "proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). MCL 768.32 permits instruction only on necessarily lesser included offenses, not cognate lesser offenses. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *Cornell*, *supra* at 357-358. A cognate offense is one that contains an element not found in the greater offense. *Cornell*, *supra* at 345.

The elements of armed robbery are (1) an assault, and (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a dangerous weapon or with an article used or fashioned in such a way as to lead a reasonable person to believe that it is a dangerous weapon. *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004).[1]

MCL 750.356d, the statute governing second- and third-degree retail fraud,[2] provides in relevant part:

> (1) A person who does any of the following in a store or in its immediate vicinity is guilty of retail fraud in the second degree…:

[1] MCL 750.529 and MCL 750.530, respectively the armed robbery and unarmed robbery statutes, were amended by 2004 PA 128 to make it clear that both armed and unarmed robbery are "transactional" offenses, i.e., that the force used to accomplish the offense need not be contemporaneous with the taking, but may take place after the larceny occurs. See *People v Morson*, 471 Mich 248, 264; 685 NW2d 203 (2004) (Corrigan, C.J., concurring). Section 529 as amended additionally provides that a defendant "who represents orally or otherwise that he or she is in possession of a dangerous weapon" may be found guilty of armed robbery.

[2] There is no indication in the record concerning the value of the merchandise stolen by defendant. However, it appears unlikely that the value of the four pairs of stolen pants was $1,000.00 or more, the threshold for first-degree retail fraud. MCL 750.356c.

* * *

(b) While a store is open to the public, steals property of the store that is offered for sale at a price of $200.00 or more but less than $1,000.00.

* * *

(4) A person who does any of the following in a store or in its immediate vicinity is guilty of retail fraud in the third degree…:

* * *

(b) While a store is open to the public, steals property of the store that is offered for sale at a price of less than $200.00.

In examining the elements of second- and third-degree retail fraud under subsections (1)(b) and (4)(b), it is clear that these offenses are not necessarily lesser included offenses of armed robbery. To prove retail fraud under these subsections, the prosecutor must show that the defendant stole property of a store; that the property was offered for sale; that the defendant was in the store or its immediate vicinity; and that the store was open to the public. None of these elements must be established to prove armed robbery under MCL 750.529, which, when read together with MCL 750.530, simply requires "a larceny of any money or other property that may be the subject of larceny."[3] Accordingly, an instruction on retail fraud was not permissible under MCL 768.32. *Reese, supra* at 446; *Cornell, supra* at 357-358.

Affirmed.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Bill Schuette

[3] "Larceny is the taking and carrying away of the property of another, done with felonious intent and without the owner's consent." *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996).